

**UNITED STATES DISTRICT COURT**

Case No.: 2:18-cv-01505-APG-PAL

## Order Denying Motion to Dismiss and Granting Motion to Transfer

[ECF Nos. 16, 17]

Defendant

Defendant L.A. Insurance Agency Franchising, LLC (LAIA) moves to dismiss or to

The plaintiffs respond that the first-to-file rule does not apply because this case and the

one LAIA filed against the plaintiffs in Michigan are too dissimilar. Alternatively, they argue

that I should not apply the rule because LAIA's Michigan complaint was an anticipatory suit

aimed at forum shopping once LAIA suspected the plaintiffs were about to file suit. The

plaintiffs also contend equitable factors weigh against applying the rule. As for the forum

selection clause, the plaintiffs argue that transfer is not warranted because the clause was the

product of fraud or overreaching, the plaintiffs would be deprived of their day in court, and

transfer would contravene Nevada policy. The plaintiffs do not specifically address transfer

under § 1404(a), but generally argue that convenience and fairness concerns weigh against

transfer to Michigan.

1       The parties are familiar with the facts so I will not repeat them here except where  
2 necessary. I deny the motion to dismiss and grant the motion to transfer.

3       Under the first-to-file rule, “when cases involving the same parties and issues have been  
4 filed in two different districts, the second district court has discretion to transfer, stay, or dismiss  
5 the second case in the interest of efficiency and judicial economy.” *Cedars-Sinai Med. Ctr. v.*  
6 *Shalala*, 125 F.3d 765, 769 (9th Cir. 1997). In determining whether to apply the first-to-file rule,  
7 I analyze three factors: “chronology of the lawsuits, similarity of the parties, and similarity of the  
8 issues.” *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015).

9       The rule is based on the premise that “[n]ormally sound judicial administration would  
10 indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court  
11 which first acquired jurisdiction should try the lawsuit and no purpose would be served by  
12 proceeding with a second action.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th  
13 Cir. 1982). Courts thus “should be driven to maximize economy, consistency, and comity” when  
14 deciding whether to apply it. *Kohn Law Grp., Inc.*, 787 F.3d at 1240 (quotation omitted); *see also*  
15 *Church of Scientology of Cal. v. U.S. Dep’t of Army*, 611 F.2d 738, 750 (9th Cir. 1979),  
16 *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d  
17 987 (9th Cir. 2016) (“The doctrine is designed to avoid placing an unnecessary burden on the  
18 federal judiciary, and to avoid the embarrassment of conflicting judgments.”).

19       Given these purposes, the rule “should not be disregarded lightly.” *Alltrade, Inc. v.*  
20 *Uniweld Prod., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) (quotation omitted). But it “is not a rigid  
21 or inflexible rule to be mechanically applied.” *Pacesetter Sys., Inc.*, 678 F.2d at 95. Thus,  
22 “[c]ircumstances and modern judicial reality . . . may demand that [courts] follow a different  
23 approach from time to time.” *Id.* (quotation omitted). Equitable considerations may weigh

1 against applying the rule. *Alltrade, Inc.*, 946 F.2d at 628. Whether to apply the first-to-file rule  
2 lies within my discretion. *Pacesetter Sys., Inc.*, 678 F.2d at 95.

3 **A. First in Time**

4 There is no dispute that LAIA’s Michigan complaint was filed first, even though both  
5 cases were filed on the same day. The plaintiffs assert that the Michigan complaint has not yet  
6 been properly served on them. But even assuming that is true, the first-to-file rule is concerned  
7 with which action was first commenced by the filing of a complaint, not which action was first  
8 served on the other side. *Pacesetter Sys., Inc.*, 678 F.2d at 96 n.3 (rejecting an argument that the  
9 first-to-file rule did not apply where the first action was not served until after the second action  
10 was filed because a “federal action is commenced by the filing of the complaint, not by service  
11 of process,” and thus it is “the filing of actions in coordinate jurisdictions that invokes  
12 considerations of comity”). Moreover, LAIA’s counsel informed the plaintiffs’ counsel of the  
13 Michigan suit before the plaintiffs filed their lawsuit when he inquired whether plaintiffs’  
14 counsel would accept service on the plaintiffs’ behalf. ECF No. 24-3. This factor therefore  
15 supports applying the first-to-file rule.

16 **B. Same Parties**

17 There is no dispute the parties in the two lawsuits are identical. This factor therefore  
18 supports applying the first-to-file rule.

19 **C. Same Issues**

20 The issues in the two cases “need not be identical, only substantially similar.” *Kohn Law*  
21 *Grp., Inc.*, 787 F.3d at 1240. “To determine whether two suits involve substantially similar  
22 issues, [I] look at whether there is substantial overlap between the two suits.” *Id.* at 1241  
23 (quotation omitted).

1           The two lawsuits involve substantially similar issues. LAIA’s Michigan lawsuit seeks  
2 declaratory relief regarding the enforceability of the franchise agreements, including declarations  
3 about the parties’ post-termination rights and obligations. ECF No. 16-1 at 9-10. It also asserts a  
4 claim for breach of the franchise agreements. *Id.* at 22-24. The plaintiffs’ first amended  
5 complaint in this case asserts claims that call into question the franchise agreements’  
6 enforceability. ECF No. 1-3 at 33-34 (deceptive trade practices claim asserting LAIA made false  
7 representations to induce the plaintiffs to enter into the franchise agreements); *id.* at 35  
8 (fraudulent inducement claim making the same assertion); *id.* at 40-43 (requesting declaratory  
9 judgment that the franchise agreements are “voidable and unenforceable”). Other claims  
10 indirectly implicate the agreements’ enforceability. For example, the plaintiffs’ claims for  
11 intentional interference with existing contractual relations and prospective economic advantage  
12 raise the potential that LAIA will claim its conduct was privileged due to the franchise  
13 agreements’ non-compete clauses. *See id.* at 32-33. The conversion claim asserts LAIA  
14 wrongfully exerted control over commissions owed to the plaintiffs, but LAIA has argued the  
15 franchise agreements allow it to do so. *See id.* at 38; ECF No. 12 at 7. All of the claims in both  
16 lawsuits arise out of the parties’ franchise relationship.

17           The similarity of issues weighs in favor of applying the first-to-file rule. Judicial  
18 economy and comity are best served by one court resolving the enforceability of the franchise  
19 agreements in one case that will comprehensively dispose of the parties’ various disputes arising  
20 from their franchise relationship. Additionally, one court resolving these issues will avoid the  
21 potential embarrassment of two courts reaching inconsistent decisions on the same issue.  
22 Consequently, the first-to-file rule applies.

1           **D. Equitable Considerations**

2           I “can, in the exercise of [my] discretion, dispense with the first-filed principle for  
3 reasons of equity.” *Alltrade, Inc.*, 946 F.2d at 628. Typically, such reasons would include “bad  
4 faith, . . . anticipatory suit, and forum shopping.” *Id.*

5           Although some circumstances here that suggest LAIA’s Michigan suit was anticipatory,  
6 the evidence overall does not support dispensing with the first-to-file rule. Before four of the  
7 five franchise agreements expired in March 2018, LAIA wrote to the plaintiffs advising that the  
8 agreements were expiring and that LAIA intended to enforce the agreements post-termination.  
9 ECF No. 16-1 at 7. After those four agreements expired, the parties agreed to continue the status  
10 quo while they negotiated a resolution. ECF No. 21-1 at 6. Plaintiff Suleiman Kutob avers that  
11 during an April 23, 2018 meeting, he told LAIA that the plaintiffs “were prepared to sue if an  
12 agreement was not reached.” *Id.* at 3-4. However, Kutob apparently did not state that a suit was  
13 imminent or that he would file suit in Nevada instead of Michigan (which would be consistent  
14 with the forum selection clause). *See id.*; ECF No. 21-3 (the plaintiffs’ transactional counsel  
15 averring that Kutob told LAIA at the April 23 meeting that he would litigate to protect the  
16 plaintiffs’ interests, but “he agreed not to in the near-term,” and instead would “continue trying  
17 to reach a settlement”).

18           In June, the parties exchanged settlement offers, with the last one coming from LAIA  
19 with a July 4 deadline. ECF Nos. 21-2 at 3, 6-9; 16-2 at 2. LAIA indicated in its final offer that  
20 “[i]f we are unable to reach an agreement, [LAIA] will move to enforce its rights under the  
21 respective franchise agreements.” ECF No. 16-2 at 2. The plaintiffs did not respond to that offer.  
22 Instead, on July 11, the plaintiffs’ counsel sent an email to LAIA’s counsel asking whether LAIA  
23 had been forging Kutob’s signature on documents. *Id.* That email did not threaten imminent

1 litigation nor did it indicate a lawsuit would be filed in Nevada. LAIA filed the Michigan  
2 complaint approximately two weeks later on July 24. ECF No. 16-1.

3 While one might infer LAIA filed the Michigan suit in response to the email asking about  
4 forged signatures, the overall course of the parties' conduct suggests the Michigan suit was  
5 neither an anticipatory strike nor forum shopping. LAIA indicated before the agreements ever  
6 expired that it expected the plaintiffs to comply with the franchise agreements' post-termination  
7 provisions. The parties agreed to maintain the status quo while they discussed settlement, but in  
8 LAIA's final offer, it stated that if the parties could not agree, LAIA would "move" to enforce its  
9 rights. That suggests that LAIA intended to file suit if its final offer was not accepted. The  
10 plaintiffs did not accept the offer or otherwise respond before the July 4 deadline. LAIA soon  
11 thereafter filed suit.

12 The July 11 email about forged signatures does not specifically threaten an imminent  
13 lawsuit nor does it indicate any lawsuit would be filed in Nevada. Thus, LAIA's suit was neither  
14 anticipatory nor forum shopping. *See Williamson v. Am. Mastiff Breeders Council*, No. 3:08-cv-  
15 336-ECR-VPC, 2009 WL 634231, at \*3 (D. Nev. Mar. 6, 2009) (gathering cases for the  
16 proposition that mere contemplation of litigation is insufficient to show an anticipatory suit and  
17 the plaintiff in the second-filed suit must have indicated suit was "imminent, such that the  
18 plaintiff's motive for filing suit first was to shop for the forum of its choice"). To the contrary,  
19 LAIA reasonably could have expected any lawsuit against it would be filed in Michigan,  
20 consistent with the forum selection clause in the franchise agreements.

21 I therefore apply the first-to-file rule. In doing so, I decline to address the parties'  
22 arguments about the appropriate forum related to the convenience of the parties or the  
23 enforceability of the forum selection clause. Those are questions for the Michigan court to

1 entertain. *See Pacesetter Sys., Inc.*, 678 F.2d at 96 (“[N]ormally the forum non conveniens  
2 argument should be addressed to the court in the first-filed action.”).

3 **E. Transfer is Appropriate**

4 LAIA requests that I either dismiss this case or transfer it to Michigan. “Although the  
5 first-to-file rule guides the district court’s exercise of discretion in handling related cases, the  
6 requirements of § 1404(a) cabin the exercise of that discretion.” *In re Bozic*, 888 F.3d 1048, 1054  
7 (9th Cir. 2018). I have discretion to transfer this action only “to any other district or division  
8 where it might have been brought.” *Id.* (quoting 28 U.S.C. § 1404(a)). That means a district  
9 where the plaintiffs “could have originally filed suit.” *Id.* at 1053.

10 The plaintiffs could have originally filed suit in the Eastern District of Michigan. The  
11 parties are diverse and the amount in controversy is satisfied. *See* ECF No. 1. Diversity  
12 jurisdiction therefore exists. 28 U.S.C. § 1332. There is no dispute that LAIA is subject to  
13 personal jurisdiction in the Eastern District of Michigan. Additionally, venue is proper there, as  
14 the only defendant resides there and the plaintiffs allege that is where they signed four of the  
15 franchise agreements. *See* ECF No. 1-3 at 14; 28 U.S.C. §§ 1391(b)(1)-(2). I therefore exercise  
16 my discretion to transfer this action to the United States District Court for the Eastern District of  
17 Michigan.

18 **F. Conclusion**

19 IT IS THEREFORE ORDERED that defendant L.A. Insurance Company’s motion to  
20 dismiss **(ECF No. 16) is DENIED.**

21 IT IS FURTHER ORDERED that defendant L.A. Insurance Company’s motion to  
22 transfer **(ECF No. 17) is GRANTED. The clerk of court is instructed to TRANSFER this**  
23 **case to the United States District Court for the Eastern District of Michigan.**

1 IT IS FURTHER ORDERED that to preserve the status quo pending transfer, my  
2 temporary restraining order (ECF No. 14) remains in effect but shall expire once the papers from  
3 this case “are physically docketed in the office of the receiving court,” because that is when the  
4 transfer to the Eastern District of Michigan is complete. *Wilson v. City of San Jose*, 111 F.3d  
5 688, 692 (9th Cir. 1997). I leave for the Michigan judge to decide whether to extend the TRO,  
6 convert it into a preliminary injunction, or schedule a hearing based on the parties’ stipulation  
7 (ECF No. 18).

8 DATED this 7th day of September, 2018.

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12 ANDREW P. GORDON  
13 UNITED STATES DISTRICT JUDGE  
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